

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 624 OF 2023

(Originating from Land Case No. 76 of 2010 and Misc. Land Application No. 347 of 2023)

M/S REGIMANUEL GRAY (T) LIMITED APPLICANT

VERSUS

MRS. MWAJABU MRISHO KITUNDU & 99 OTHERS RESPONDENTS

RULING

Date of last Order: 06/12/2023

Date of Ruling: 25/01/2024

MWAIPOPO, J:

This is an application for setting aside the dismissal order and restoration of Misc. Land Application No. 347 of 2023, which was dismissed for want of prosecution. The Application was preferred under order IX Rule 6(1), Order XLIII, Rule 2 and Section 95 of the Civil Procedure Code Cap. 33 R. E. 2019. The Application is made by way of Chamber Summons supported by an Affidavit of the Counsel for the Applicant, learned counsel Deogratias, J Lyimo Kirita and it contains the following prayers: -

- (a) That this court be pleased to set aside the dismissal order of the Applicant's Application issued by Court on 7th September, 2023 by Hon. Mhina J, in Miscellaneous Land Application No. 347 of 2023, restore the Application and order that the Application be heard and determined inter partes.**
- (b) Costs.**

(c) Any other reliefs this Court deems appropriate to grant.

In opposition to the Application, the Respondents filed Counter Affidavits sworn by the following persons: - learned counsel Deogratius Mwarabu for 1st Respondent, learned State Attorney Stanley Mahenge for the 2nd, 3rd and 4th Respondents and learned counsel Samwel Shadrack Ntabaliba the 7th to 100th Respondents.

The Application was heard by way of written submissions, pursuant to the order of the Court dated 6th December, 2023, whereby the Applicant was ordered to file their submissions on or before 21st of December, 2023, the Respondents were to file their submissions in reply on or before 4th of January, 2023 and Rejoinder if any was to be filed on or before 11th of January, 2024. Finally, the Court set the date for the delivery of the Ruling on 25th of January 2024.

However, according to the records contained on the Court file, the Applicant filed his submissions on the 20th of December, 2023 in compliance with the Court order, the 1st Respondent filed her reply to the written submissions on the 3rd of January, 2024 and the rest of the Respondents did not comply with the order of the Court. Therefore, the matter proceeded ex parte in respect of the Respondents who did not comply with the order of the Court, i.e. the 2nd to 100th Respondents

Submitting in support of his Application, the learned counsel Deogratius Kirita began by drawing the attention of the Court to the preliminary observations on the anomalies he had noted regarding the Counter Affidavits. It was his submission that, upon filing the Application on 25th September, 2023, the Court issued summons for the parties to appear for hearing of the Application before the trial Judge on the date fixed by the Court, i.e. 27th of October 2023 before Mhina J. The Court further ordered the Respondents to be served within 7 days and the Respondents to file their Counter Affidavits on or before

10th of October 2023. The Respondents were duly served with the Application within 7 days and ordered to file their Counter Affidavits on or before 10th of October, 2023. In compliance with the order of the Court and the summons issued, the Respondents were duly served 4th October, 2023. The learned counsel went to submit that the Counter Affidavits for the 1st, 2nd, 3rd and 4th Respondents were filed in Court on 10th of October, 2023 instead of 8th October, 2023 as ordered by the Court, hence out of time and without leave of the Court to do so. In view of the foregoing, the Applicant prayed for the said Counter Affidavits to be struck out for being filed out of time.

The learned counsel further asserted that, the 5th and 6th Respondents and the 7th to 100th Respondents though were served through their Advocates, Associated Attorneys and Kazi Attorneys on 4th of October, 2023 respectively, did not file their Counter Affidavits, meaning that they did not oppose the Application.

As for the merits of the case the counsel argued that the Application is meritorious and that the Applicant has adduced sufficient reasons for his failure to appear before the Court when the Miscellaneous Land Application No. 347 of 2023 was set for hearing on 7th of September, 2023. The learned counsel submitted that the hearing of the Application on 7th September, 2023 was the first day for the parties to appear before the court.

According to his Affidavit, the Advocate was aware of the hearing on 7th September, 2023. He also shared information regarding the hearing of the Application with learned Advocate Deogratius Mwarabu the Advocate for the 1st Respondent on the morning of the hearing date, who in turn requested the him to hold his brief and request for the adjournment of the hearing of the Application for the reasons that he was in Dodoma and could not make it to court for the hearing of the Application. He was of the view that this fact is

also acknowledged by the 1st Respondents Advocate under para 5 of his Counter Affidavit thereof.

The learned counsel for the Applicant submitted that, since the Applicant has shared the information about the hearing of the Application and had accepted the request of the Advocate for the 1st Respondent of holding his brief and praying for an adjournment of the hearing of the Application, clearly shows that the Advocate for the Applicant was prepared to appear before the Court for hearing of the Application on the 7th of September, 2023. He also submitted that the learned counsel for the 5th and 6th Respondents Mr. Mwambene Adam Anonisye from Associated Attorney's, also intimated to him that they would not file any Counter Affidavit to oppose the Application.

Mr. Deogratus Kirita contended further that, with all the preparedness for the case, while on his way to Court for the hearing of the Application which was set at 10:00 hours, on 7th of September, 2023, at around 09:40 he felt unwell and rushed to Suma JKT Petrol Station at Kawe area, where he started vomiting and feeling feverish and dizzy. He thus decided to go to Kairuki Hospital whereby upon being diagnosed he was found with malaria, given appropriate medicine and exempted from duty for two days. He referred the Court to the copy of the Medical Report from Kairuki Hospital attached to the Applicant's Affidavit. He contended that the same has not been contested by the parties and that it clearly shows that he was prevented by sufficient reasons from attending to Court for hearing on 7th of September, 2023.

The learned counsel submitted further that, after treatment, he went to Court, where he met the Court clerk who informed him that the matter had already been dismissed. To cement further his arguments, the learned counsel stated that the fact that he was indisposed, has not been contested by the 1st, 2nd, 3rd and 4th Respondents in their Counter Affidavits. The 1st Respondent in her Counter Affidavit stated that she touched base with the learned counsel on

the morning, of 7th September, 2023 but he did not inform him that he was sick while the 2nd, 3rd and 4th Respondents in their Counter Affidavits have deposed that, the contents of the Medical Report showing the health condition of the Advocate for the Applicant is different from what is deposed in the Applicant's Affidavit in support of the Application. The Applicant's counsel contends that, this matter was not substantiated. He concluded by stating that, the Applicant has given sufficient reasons for his non appearance on 7th September, 2023 and humbly prays for the Application to be granted as prayed since it has not been opposed.

As intimated earlier on, only the 1st Respondent filed her written submissions. In rebuttal, the counsel for the 1st Respondent began his submissions by objections to the preliminary observation raised by the counsel for the Applicant to the effect that the Counter Affidavit by the 1st Respondent was filed out of time stipulated by the Court. The learned counsel submitted that, to his understanding, the counsel for the Applicant is deploying delaying tactics by coming up with such an assertion. It was his submission that the Court should not pay any attention to his submissions since the Counter Affidavit for the 1st Respondent was duly filed in time.

With regard to the submissions on the merits of the case, the learned counsel submitted that they lack merit since the Applicant has failed to demonstrate good and sufficient reasons to enable this court to exercise its discretionary powers to set aside the dismissal order, since the same was issued based on the negligence of the Applicant together with his firm. He gave reasons for the negligence as follows: -

Firstly, the counsel for the Applicant never shared his illness when they discussed about his request for holding his brief on the matter. The learned counsel for the 1st Respondent only knew about the issue of non-appearance of the counsel for the Applicant when he took the responsibility of following

up on the status of the case, whereby he instructed the clerk of his law firm to make sure that the appearance before the Court is taken care of. That is when he noted that the learned counsel for the Applicant did not enter appearance. He thus submitted that the issue of illness was an afterthought.

Thirdly, the counsel argued that, neither any Director or Principal officer of the Applicant appeared in Court. The Applicant being a corporate legal entity is a Constituent of Board of Directors and other Principal Officers who are representing the Applicant on its behalf. The learned Advocate upon falling sick, he ought to have shared the information with his client, the Applicant. He contended that Court's jurisprudence emphasizes on Advocates following up on their cases every time to avoid unnecessary adjournments and excuses that tend to delay fast disposal of cases. He however never cited any case to that effect. To cement further his submissions, the learned counsel asserted that the Applicant's counsel is not practicing as a solo practitioner, he is working as a partner in a law firm thus Courts have been emphasizing that Advocates should have good communication and relationship with their fellows in their firms, and be aware of cases each one is handling so that whenever one is unable to attend for whatever reasons, another one steps in the shoes and prosecute or enter appearance on behalf. However, this was not done. He further argued that the learned Advocate's Office is closer to the Court, he could have sent a clerk of another firm to inform the Court about his illness.

The learned counsel for the 1st Respondent concluded his submissions by stating that non appearance of the Applicant was a gross negligence which was occasioned by malicious motive of delaying fast disposal of the case, this can be proved by the fact that Misc. Land Application no. 347/2023 which is sought to be restored by the Applicant deals with extension of time within which the Applicant did not take immediate steps within time to seek redress

he so wishes hence the reasons given are purely an afterthought and tends to mislead the Court, while the Applicant was negligent. The Counsel did not submit anything on costs.

As it is the norm, whenever there is a preliminary observation raised by a party, the Court will first dispose it before determining the merits of the case. In line with submissions by the counsel for the Applicant, I have perused the Court records in the file and noted that on the 25th of September, 2023 when this matter was called for the first time before Hon. Mhina, J. the Court ordered as follows: -

- (a) Summons and other relevant documents be served to the Respondents within seven 7 days from the date of this order.
- (b) Counter Affidavit be filed on or before 8th of October, 2023.
- (c) Reply to Counter Affidavit be filed on or before 15/10/2023.
- (d) Hearing on 27th October, 2023 at 10:30.
- (e) Parties be notified.

The learned counsel for the Applicant has argued in his submissions that the 1st, 2nd, 3rd and 4th Respondents filed their Counter Affidavits on 10th of October, 2023 instead of 8th of October, 2023, without leave of the Court to be granted extension of time to do so, therefore the Application should be struck out. Further, the 5th to 100th Respondents though served through their Advocates did not file their Counter Affidavits, meaning that they opted not to oppose the Application.

The 1st Respondent in her submissions objected to the arguments by the Applicant by stating that the same were filed on time and that the counsel for the Applicant is deploying deceitful tactics and prayed for the Court to pay no attention to the same.

Based on the foregoing assertions between parties, it is still the view of the Court that, the said preliminary observation ought to have been raised earlier on before the Application was set for hearing. A requirement of notice is meant to prevent surprise and ensure fair hearing. In the case of **Commissioner General (TRA) vs Pan African Energy (T) Ltd, Civil Application No. 206 of 2016** (unreported) when the Court was faced with a situation akin to this one in an application, amidst submissions in respect of a preliminary objection, the counsel for the Respondent raised a preliminary objection. In the Court of Appeal Rules there was no provision of lodging a prior notice to the preliminary objection, the Court stated that:

"We made it clear that there is no specific rule concerning preliminary objections to applications filed in Court. We were also satisfied that a preliminary objection to an application is procedurally similar to preliminary objection to an appeal and must therefore be made before hearing of the application begins. It may be relevant to state that the Applicant, as stated by Mr. Bhojan, has surprised the opposite party and the court by raising a preliminary objection without prior notice. It is elementary law that litigation should be conducted fairly, openly and without surprises. In Hon. B.P. Mramba vs Leons S. Ngalai and The Attorney General [1986] TLR 182 we made reference to Halsbury Laws of England, 4th Edition, Vol. 36 paragraph 38 and underlined".

"The function of particulars is to carry into operation the overriding principle that litigation between the parties and particularly the trial, should be conducted

fairly, openly and without surprises and incidentally reduce costs”.

After saying so, the Court of Appeal went on to state that: -

“On this point we find it irresistible to associate with the persuasive decision of the High Court of Kenya (Mbugholi, and Kulomba JJ) in Juma and Others vs. Attorney General {2003} 2 EA 461”, wherein it was stated at page 467: -

“Justice is better served when the element of surprise is eliminated from the trial and the parties are prepared to address issues on the basis of complete information of the case to be met for avoidance of doubt, we are aware that the foregoing authorities were dealing with surprise in the course of trial. However, we are certain in our minds that the principle is applicable to the situation at hand as well”.

In those two cited cases above, the Court refrained from entertaining the preliminary objection for lack of a prior notice. I follow the same position. I now move to deliberate on the submissions filed by the Applicant and the 1st Respondent, who complied with the order of the Court.

Having read the respective submissions by the parties, the issue to be determined is whether the Applicant has demonstrated sufficient reasons to warrant this court to set aside its dismissal order and restore the dismissed application for the dismissal order to be set aside, the Applicant must prove that he or she was prevented from prosecuting his case by sufficient cause. Provisions of Order XLIII Rule 6 (1) of the Civil Procedure Code Act, Cap. 33 R. E. 2022 provides that where a suit is wholly or partly

dismissed for non-appearance, the Applicant/Plaintiff shall be precluded from bringing a new case regarding the same cause of action. However, he may apply for an order to set aside the dismissal order, if he satisfies the Court, that there was a sufficient cause for his non appearance when the suit was called on for hearing so that the Court can restore his application.

In the case of **Sadru Mangasi vs Abdul Aziz Lalani & 2 Others, Misc. Commercial Application No. 126 of 2016**, the High Court of Tanzania, Mwanza Registry (unreported) the Court held that: -

"It is served law that an applicant seeking to set aside a dismissal order of the Court dismissing any suit for want of prosecution he has to furnish the Court with sufficient reasons for non-appearance when the suit was called for hearing".

Also, in the case of **Mwidini Hassan Shila and 2 Others vs Asinawi Makutika and 4 Others, Land Appeal No. 4 of 2019**, High Court unreported) where it was held that: -

"It is trite law that powers to set aside dismissal orders are in the discretion of the court, however the Applicant should furnish sufficient reasons to enable the Court to exercise its discretionary power".

In the instant application, the counsel for the Applicant's main reason for failure to comply with the order of the Court dated 7th September, 2023 is sickness following the diagnosis of Malaria, reached by Kairuki Hospital. The Applicant has attached to his Affidavit, a copy of a Medical Report from Kairuki Hospital, indicating that he was diagnosed with malaria and a prescription of antemisal and paracetamol tablets was given as well as an ED for two days was granted.

The counsel for the 1st Respondent has objected to the prayer for restoration of the suit for the reason that the ground of sickness advanced was an afterthought after the learned counsel had negligently failed to appear before the Court as required, and secondly, him being a partner in a law firm could have informed and instructed other advocates or their Clerk or one of the officers in the firm to follow up the matter after he had fallen ill.

The Applicant, in his supporting Affidavit as well as the Written submissions has narrated at length on how he fell ill on the date scheduled for hearing and how he underwent treatment at Kairuki Hospital, diagnosed with malaria, prescribed with the dose and given an ED for two days. He referred the Court to the Medical Certificate attached to his Affidavit.

Having taken due consideration, to what has been stated in the Affidavit, and the written submissions of the Applicant, I am convinced that the Applicant's non appearance was due to his sickness which is explicable and excusable as stated in the case of **John Daud Kashekya vs The Attorney General, Civil Application No. 107 of 2012 CAT** (unreported), whereby the Court of Tanzania held that: -

"Sickness is a condition which is experienced by a person who is sick. It is not a shared experience. Except for children who are yet in a position to express their feeling, it is the sick person who can express his/her condition whether he/she has the strength to move, work and do whatever kind, of work he is required to do".

In the case of **Pius H. W. Ogunde vs Edward Elia Ngala, Misc. Land Application No. 529 of 2023 HCT Dsm**, my sister Mgeyekwa, J, as she

then was, when confronted with the similar situation, she affirmed the position taken in this cited case of **John Kashekya (supra)** and went on to hold further as follows: -

"This Court cannot ask more from the Applicant's Advocate, rather the Court is satisfied that the experience by the person who faced the said problem is not a shared experience".

See also the case of **Cyprian John Moshi vs TPB Bank and 2 others Land Appeal No. 305 of 2021.**

Guided by the above authorities, it is clear that sickness can be used as a reasonable ground for setting aside a dismissal order and restoration of the suit which has been dismissed for non-appearance if sufficiently proved. In this matter the Applicant's counsel has managed to show that the situations covered in the said cases fits well to his position.

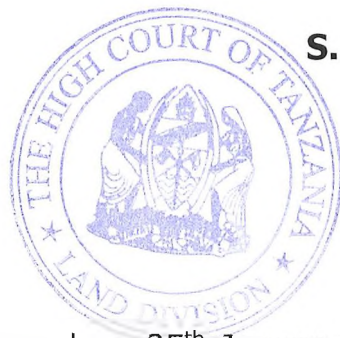
With regard to the issue raised by the Respondents on the need for counsel for the Applicant to touch base with other fellow Advocates and officers in the law firm to proceed with the matter, Hon. Mgeyekwa, J. as she then was stated in the case of Kashekya (supra) that; -

"I do differ with the respondent's submissions and I don't want to be pessimistic that the learned counsel could have instructed another advocate to proceed with the case.

On my part too, I do differ with the 1st Respondent's submissions and I would not want to be pessimistic that given his condition at the time, the learned counsel could have instructed another advocate to proceed with the case. It suffices to find out first that, the learned counsel Deogratius, J. Lyimo Kirita fell sick on that material date.

In the upshot I find the application meritorious, I proceed to set aside the dismissal order given by this Court on 7th September 2023, in Misc. Land Application No. 347 of 2023 and restore the Application accordingly. Each party shall bear its own costs.

It is so ordered.



S. D. Mwaipopo
S. D. MWAIPOPO

JUDGE

25/01/2024

Ruling delivered on 25th January, 2024 in the presence of Deogratius Lyimo Kirita, Advocate for the Applicant, Charles Leonard Yoram, Advocate for 1st Respondent, Augustino Mahela Matarifa, Advocate for 5th and 6th Respondents is hereby certified as a true copy of the original.



S. D. Mwaipopo
S. D. MWAIPOPO

JUDGE

25/01/2024